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No. 76-1146

In the Supreme Court of the United States

OCTOBER TERM, 1976

B & E PAVING COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The question presented by the petition is whether the decision below correctly held that petitioner Bartone could not claim his Fifth Amendment privilege against compulsory self-incrimination as a ground for refusing to produce financial records of his partnership that were sought by an Internal Revenue Service summons.

The pertinent facts are as follows: During the course of an investigation of Bartone's income tax liabilities for 1972, Special Agent Francis T. Brady issued a summons to Bartone, a partner in B & E Paving Company, requesting the financial records of the partnership (R. A-5, A-30, A-32).[1] In this action to enforce the summons

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[1] "R." refers to the record appendix filed in the court of appeals.

brought by the government in the United States District Court for the Eastern District of New York, the district court found that the summons had been issued in good faith and prior to a recommendation for criminal prosecution, and that Bartone could not claim his Fifth Amendment privilege as a bar to the production of the partnership records (R. A-92, A-98 to A-99, A-101). The court of appeals affirmed on the authority of this Court's decision in *Bellis* v. *United States*, 417 U.S. 85 (Pet. App. A1-A2).

The court of appeals correctly held that this case is controlled by *Bellis*, in which the Court stated that "an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." 417 U.S. at 89. Accord: *Fisher* v. *United States*, 425 U.S. 391, 408. Here, the district court found (R. A-97) that B & E Paving Company was a formally organized partnership and rejected petitioners' characterization of the partnership as an informal association or a temporary arrangement for a few short-term projects. Cf. *Bellis* v. *United States*, *supra*, 417 U.S. at 95.[2]

Finally, petitioners suggest (Pet. 3, 7) that the fact that the partnership had been dissolved and that Bartone had obtained possession and control of all partnership books

[2]Petitioners' reliance upon *In re Subpoena Duces Tecum*, 81 F. Supp. 418 (N.D. Cal.), and *United States* v. *Slutsky*, 352 F. Supp. 1105 (S.D. N.Y.), is therefore misplaced. With respect to those cases, the Court in *Bellis* stated (417 U.S. at 101) that "[t]his might be a different case if it involved a small family partnership * * * or * * * some other pre-existing relationship of confidentiality among the partners."

and records somehow gave Bartone a greater claim to Fifth Amendment protection. But the Court in *Bellis* made it clear that the dissolution of a partnership does not afford a partner any greater claim to the privilege than he would have if the partnership were still in existence (see 417 U.S. at 96, n. 3).

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.